

In the May 2, 2011, Award, the ALJ determined that claimant sustained a compensable right shoulder injury on October 27, 2008. The ALJ further found that the evidence presented failed to establish a work-related injury that resulted in an impairment rating attributable to neck complaints, or a work disability due to restrictions premised on those complaints. The ALJ awarded claimant benefits based upon an 8% functional impairment to the right upper extremity at the level of the shoulder.

Claimant contends that her neck injury compelled her physician to impose permanent restrictions, which resulted in a task loss. And because claimant and is no longer working, she has a wage loss. Claimant asserts she is entitled to work disability based upon the average of her task loss and wage loss.

Respondent argues claimant has failed to prove that she sustained an injury to her neck, and requests the Board affirm the Award.

At oral argument, the parties stipulated that claimant suffered an 8% permanent impairment to the right shoulder. The parties further stipulated that if the Board determines claimant has a work-related neck injury, then claimant has a 5% permanent functional impairment to the body as a whole for the neck.

The issues before the Board on this appeal are:

1. Did claimant suffer a neck injury by accident arising out of and in the course of employment?;
2. If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

On October 27, 2008, claimant suffered an injury to the right shoulder after pulling a trash bag, weighing approximately 40 pounds, out of a barrel.¹ Claimant immediately reported the incident to Rachael, her supervisor. Claimant continued to work for three days, and continued to get worse. Claimant testified that she told her supervisor that the center of her neck hurt all the way to the shoulder as she continued to work.² Claimant denies having any right shoulder or neck problems before the accident.

Claimant was first seen for her injury by Dr. Terry R. Hunsberger on October 29, 2008 at the direction of respondent. She reported an injury to the right shoulder, but Dr. Hunsberger's report does not mention a neck injury.³ Claimant alleges she reported neck pain to Dr. Hunsberger during this first appointment. She indicated her pain started in the neck and radiated into her shoulder.⁴ On November 8, 2008, x-rays were taken of claimant's right shoulder, and revealed a normal right shoulder. Claimant was diagnosed with tendinitis, and was referred to physical therapy.

¹ R.H. Trans. at 10.

² *Id.* at 11.

³ Garcia Depo. (Mar. 29, 2011), Ex 5 at 40-41 (Dr. Hunsberger's Oct. 29, 2008 office note).

⁴ R.H. Trans. at 22-23.

Claimant continued to have right shoulder pain, and on November 19, 2008, returned to see Dr. Hunsberger. At the request of Dr. Hunsberger, claimant underwent an MRI of the right shoulder on December 5, 2008. The MRI revealed a rotator cuff tear. Dr. Hunsberger referred claimant to Dr. Guillermo Garcia, an orthopedic physician at Siena Medical Clinic.

Dr. Garcia first saw claimant on December 15, 2008. He obtained from claimant a history of the injury, reviewed reports from Dr. Hunsberger, reviewed the MRI ordered by Dr. Hunsberger and physically examined claimant. Dr. Garcia diagnosed claimant with a rotator cuff tear. He testified that his physical examination of claimant revealed some range of motion restriction in claimant's right shoulder, particularly the side-to-side rotational motion was restricted. He indicated claimant had a normal range of motion in her neck⁵. Initially Dr. Garcia treated claimant conservatively, which included, a cortisone injection, physical therapy and a prescription for an anti-inflammatory medication. Dr. Garcia indicated claimant did not complain of neck pain during her first appointment.

Dr. Garcia next saw claimant on January 15, 2009, at which time her condition had not improved significantly with conservative treatment. Dr. Garcia advised claimant to proceed with an arthroscopic examination of the shoulder and debridement of the shoulder joint. He testified that at this appointment, claimant reported no injuries other than to her right shoulder.⁶

On March 6, 2009, Dr. Garcia performed surgery on claimant to debride the shoulder and repair the rotator cuff. After surgery, claimant was given simple exercises to perform, followed by physical therapy. Claimant returned to see Dr. Garcia on July 27, 2009, for a follow-up. Dr. Garcia testified that claimant did not mention a neck injury to him during that visit.⁷ Another follow-up visit took place on August 24, 2009, and claimant again made no complaints of a neck injury⁸.

Dr. Garcia testified that the first time claimant mentioned neck symptoms was during a September 14, 2009, appointment. Dr. Garcia then ordered an MRI of claimant's neck, which came back as normal.⁹ Dr. Garcia saw claimant again on October 1, 2009, and assigned 10% permanent impairment to claimant's right shoulder in accordance with the

⁵ Garcia Depo. (Mar. 29, 2011) at 6-7.

⁶ *Id.* at 8.

⁷ *Id.* at 9.

⁸ *Id.* at 10.

⁹ *Id.* at 11.

AMA *Guides*.¹⁰ He assigned no impairment to claimant's neck. Dr. Garcia restricted claimant to a limited amount of work above shoulder level solely as a result of her right shoulder injury. Dr. Garcia testified that based on his restrictions, claimant could no longer perform 4 of 31 job tasks.

Siena Medical Clinic records indicate claimant complained of neck pain to Dr. Garcia's staff on January 15, 2009, and February 20, 2009. Both of those incidents occurred prior to the rotator cuff surgery. After surgery, claimant also complained of neck pain to staff members. Dr. Garcia's report dated September 14, 2009, states that claimant had tightness on the right external plate of the mastoid, which in laymen's terms is tightness of the muscles from the side of the neck.¹¹ Dr. Garcia indicated it was not unusual for a patient with a rotator cuff injury to have neck pain. However, the pain usually develops two to three months after the patient is in physical rehabilitation.

Claimant was fired by respondent on November 9, 2009, allegedly because she was unable to perform her duties.¹² Claimant has not been employed since being fired and is receiving unemployment benefits. She has applied for other jobs, but cannot find employment because of her restrictions. Claimant has applied for Social Security Disability benefits for a third time, but has not received a decision.

At the request of her counsel, claimant was seen by Dr. Pedro A. Murati on January 5, 2010. Dr. Murati reviewed claimant's medical records, took a medical history and physically examined claimant. His impression was that claimant was status post right surgical scope and debridement and open repair of the rotator cuff; myofascial pain syndrome of the right shoulder girdle, extending into the cervical paraspinals; AC crepitus of the right shoulder; and right axillary neuropathy.

Utilizing the AMA *Guides*, Dr. Murati assigned claimant a 3% impairment to the right upper extremity for the right axillary neuropathy, a 3% impairment to the right upper extremity for AC crepitus, which combine for a 6% impairment to the right upper extremity which converts to a 4% impairment to the body as a whole. For myofascial pain syndrome affecting the cervical paraspinals, Dr. Murati determined claimant falls into Cervicothoracic DRE Category II for a 5% permanent impairment to the body as a whole. The right upper extremity impairments and cervical impairment combine for a 9% impairment to the body as a whole.¹³

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

¹¹ Garcia Depo. (Mar. 29, 2011) at 20.

¹² Id. at 14.

¹³ Murati Depo. (Mar. 3, 2009) at 7-8 and Ex. 2 at 3-4 (Dr. Murati's Jan. 5, 2010 report)..

Dr. Murati testified he found trigger points, which is a localized area of muscle tissue that is hypertonic in character, in claimant's right shoulder girdle and her cervical spine.¹⁴ He testified that claimant's cervical spine MRI was normal, but that a soft tissue injury, such as that suffered by claimant, would not show up on an MRI.¹⁵

As a result of the right shoulder and neck injuries, Dr. Murati restricted claimant to no climbing ladders, crawling, working above shoulder level on the right, or lifting or carrying pushing or pulling more than 20 pounds. He also restricted claimant from occasionally lifting 20 pounds or frequently lifting 10 pounds. Claimant was also restricted by Dr. Murati from working more than 18 inches from the body using her right arm, and to avoid awkward positions of the neck. Based upon these restrictions, Dr. Murati opined claimant could not perform 22 of 31 distinct and non-duplicative tasks identified by vocational rehabilitation counselor, Doug Lindahl, for a 71% task loss.¹⁶

Doug Lindahl interviewed claimant by telephone on May 3 and 4, 2010. He elicited from claimant a list of work tasks performed in the 15 years prior to the accident. He also reviewed claimant's wage information and Dr. Murati's report of January 5, 2010. Mr. Lindahl identified 31 non-duplicative work tasks performed by claimant.

The parties agreed to a Stipulated Order for Independent Medical Examiner, wherein, Dr. Pat D. Do, an orthopedic surgeon, was appointed to conduct an independent evaluation of claimant to determine her impairment of function and permanent work restrictions. Claimant was examined by Dr. Do on August 26, 2010. Dr. Do reviewed claimant's medical records, obtained a history from claimant and physically examined claimant.

Claimant's chief complaint to Dr. Do was of post-surgery nerve pain in the right shoulder and right side of the neck. She also complained of headaches. His impression was that claimant is status post status right shoulder open rotator cuff repair and myofascial neck pain with headaches which he believed is referred pain from her shoulder.¹⁷

Dr. Do opined that claimant has no permanent impairment to her neck, as neck pain following a shoulder injury is common in many patients. He indicated the muscles spasm to protect the shoulder area.¹⁸ Dr. Do also testified that claimant's neck pain was not

¹⁴ *Id.* at 10-11.

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 10.

¹⁷ Do Depo. (Jan. 9, 2011), Ex. 2 at 3 (Dr. Do's Aug. 26, 2010 IME Report).

¹⁸ *Id.* at 7-8.

related to the accident, if the first time claimant complained to Dr. Garcia of neck pain was one year after the accident.¹⁹ He opined claimant's neck pain is referred from the shoulder.²⁰ The following testimony of Dr. Do is significant:

Q. (Ms. Black) If Ms. Hernandez had some significant neck pain at the onset of this injury, before she ever had surgery on her shoulder, and then had some range of motion problems with her neck when she was at the end of this treatment, in that case it's possible that she might have some separate ratable condition in her neck; is that correct?

A. (Dr. Do) Yes.

Q. That's not the situation in this case, is it?

A. Not that I can see.

Q. Okay. So it remains your opinion, within a reasonable degree of medical certainty, that Ms. Hernandez has no impairment to her neck.

A. Nothing obvious.²¹

Dr. Do assigned a 7% (4% for loss of flexion, 2% for loss of abduction, and 1% for loss of extension) upper extremity impairment for claimant's work injury to the right shoulder.²² He assigned permanent restrictions for the shoulder of no lifting more than 20 pounds overhead or above the shoulder with the right shoulder and no more than 0-33% the day is appropriate, and no working more than 18 inches from the body.²³

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

¹⁹ *Id.* at 11.

²⁰ *Id.* at 14.

²¹ *Id.* at 18.

²² *Id.*, Ex. 2 at 3 (Dr. Do's Aug. 26, 2010 IME Report).

²³ *Id.*

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.²⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.²⁶

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

²⁴ K.S.A. 2008 Supp. 44-501(a).

²⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

²⁶ *Id.* at 278.

earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510d(a) states in part:

Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

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(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

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(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

ANALYSIS

Both Drs. Garcia and Do found the appropriate rating for claimant's impairment to be to the upper extremity, not to the neck. Claimant's range of motion in the neck was

normal before and after the rotator cuff surgery. Dr. Garcia indicated claimant first complained to him of neck pain on September 14, 2009. He immediately ordered an MRI of the neck, which was normal. Both physicians testified that post-surgery neck pain was not unusual.

Dr. Do considered claimant's neck pain to be referred from the right shoulder, not a separate neck injury. The opinions of Drs. Garcia and Do are credible. Dr. Garcia was claimant's treating physician and examined her on a number of occasions. Dr. Do was appointed by the ALJ to independently examine claimant. Both opined claimant's neck pain is not a separate and ratable injury.

In *Ney*,²⁷ the facts were similar to those in the current claim. *Ney* had a left shoulder injury and also alleged a neck injury. Two physicians, one being Dr. Hufford, considered *Ney*'s impairment limited to the shoulder. Dr. Hufford believed *Ney*'s neck pain was referred from the shoulder. The Board determined *Ney* did not suffer a separate ratable neck injury. The Board stated, "The AMA *Guides* does not provide a rating for referred pain, but it does provide for rating pain."

As the Court of Appeals noted in *De La Luz-Guzman-Lepe*,²⁸ appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts did not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful"²⁹

Here the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented insufficient evidence to prove a permanent impairment to her neck. Accordingly the Board concludes claimant has failed to prove by a preponderance of the evidence that she suffered a neck injury arising out of and in the course of employment.

CONCLUSION

Claimant is entitled to an award of permanent partial disability compensation based upon an 8% permanent impairment of function to her right upper extremity at the level of the shoulder.

²⁷ *Ney v. General Finance, Inc.*, No. 1,037,855, 2010 WL 3489640 (Kan. WCAB Aug. 26, 2010).

²⁸ *De La Luz-Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

²⁹ *State v Scaife*, 286 Kan. 614, 624, 186 P. 3d. 755 (2008).

Claimant did not suffer a neck injury arising out of and in the course of her employment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the May 2, 2011, Award entered by Administrative Law Judge Pamela J. Fuller.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

³⁰ K.S.A. 2010 Supp. 44-555c(k).